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May 4, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: January 5, 2005

Case Number: TSO-0182

This Decision concerns the eligibility of xxxxxxxxxxxxxxxxxxxx (hereinafter "the individual") for continued access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the individual's access authorization should be restored.

I. BACKGROUND

On August 3, 2003, as a normal part of the personnel assurance program (PAP) the individual had a "counterintelligence scope polygraph." During the interview with the polygraph examiner prior to the polygraph examination, the individual described three instances in which he did not properly protect classified information, as well as a pattern of taking work papers home which resulted in the individual's failing to protect classified information on 24 occasions. Transcript of April 23, 2004, Personnel Security Interview (hereinafter Tr. of PSI) at 7-10. The three instances and the pattern that led to the 24 failures will be referred to in the decision as the individual's four failures to protect classified information. The individual's four failures to protect classified information are:

1. In 1985 or 1986 the individual received a security infraction (hereinafter "1985 slide security infraction"). Tr. at 57. The individual returned home after 10 P.M., following an out of town presentation. It was not until the next day that he returned to the work site the classified slides used at the meeting. The individual received a security infraction for not returning the classified slides on the evening of his return. Tr. of PSI at 60 and Transcript of Hearing (Tr.) at 59.

2. Between 1973 and 1986, the individual worked in the industrial engineering department reviewing engineering data and generating work papers and reports. On most days the individual took unclassified work papers and reports home to complete his work assignments. Tr. at 90.

However, on as many as 24 occasions, the individual took home work papers that contained classified information (hereinafter “the 24 removal incidents”). Tr. of PSI at 13.

3. In 2003 the individual took 5 parts of a draft report home to read (hereinafter “draft report incident”). Tr. at 72. When reading those portions of the draft report, he realized they contained a month and year for the completion of a project. He believed the date was classified. Therefore, since he believed that the document was classified, taking the document home was a failure to properly protect classified information. Tr. of PSI 27.

4. In January 2004 the individual sent an e-mail with his travel arrangements to his home computer (hereinafter the “e-mail incident”). He attached several documents to his e-mail. One of the attached documents had its own attachments and one of those attachments contained the minutes of a prior meeting. That incident included unclassified¹ controlled nuclear information (UCNI). Tr. of PSI at 60. After sending the e-mail, the individual received a telephone call from a security officer who counseled him to be careful that his off site e-mails did not contain classified information. Tr. of PSI at 60.

As a result of the polygraph operator’s report,² the DOE conducted a personnel security interview (PSI) with the individual on April 23, 2004. During that PSI the individual repeated his description of his four failures to protect classified information. On September 20, 2004, the Manager of the Personnel Security Department, National Nuclear Security Administration (NNSA), Department of Energy (DOE) issued a Notification Letter to the individual. The Notification Letter indicates that the individual’s four failures to protect classified information raises a security concern under Criterion G. 10 C.F.R. § 710.8(g). The individual requested a hearing in this matter and the NNSA forwarded this request to the Office of Hearings and Appeals. I was appointed to serve as the hearing officer. In accordance with 10 C.F.R. § 710.25(e) and (g), I convened a hearing in this matter (the hearing).

II. HEARING TESTIMONY

At the hearing, the individual testified on his own behalf, and he presented the testimony of his supervisor. The DOE presented the testimony of the security specialist. A summary of the testimony follows.

¹ While the e-mail contained only UNCI information which is not technically classified, the security concerns are similar. For ease of reference in this determination I will refer to all of the documents as classified.

² The report of the polygraph operator was not submitted into the record of the proceeding. The only information in the record about the report are references to the report made by the security specialist and the individual during the transcribed PSI. Tr. of PSI at 8.

A. The Security Specialist

The security specialist testified that all four of the failures to protect classified information were self reported. Tr. at 110. She testified that the DOE's concern is that the individual regularly removed classified information over an extended period of time. Tr. at 113. She testified that the 24 times the individual removed classified information between 1971 and 1986 indicated a pattern which was repeated in 2003 by the removal of a draft report that included the completion date for the project. Tr. at 102. She indicated that it was his "continuous disregard that raises a concern." Tr. at 116.

She also indicated that the information the individual removed in 2003 (the draft report incident) was later determined to be unclassified. Tr. at 114. She testified that removal of information which the individual believes to be classified is a security concern. However, she said a determination that the document was not classified should be considered a mitigating factor. Finally, she testified concerning the 1985 slide security infraction. She indicated that there were a number of factors that might be considered mitigating factors:

[it was] an isolated incident, and could be mitigated by the individual's lack of knowledge, human error, no concerns regarding the compromise of information, and that incident in the 1980's did not develop into a security infraction

Tr. at 113.

B. The Supervisor

The supervisor has worked at the DOE site for 25 years. Tr. at 63. He is currently a derivative classifier and supervises a group that maintains the site's contingency response plans. Tr. at 64 and 86. He has known and worked with the individual on a number of projects in the safeguard and security area since 1985. Tr. at 65. He testified that he has never had any concerns about the individual's protection of classified information. Tr. at 67.

The supervisor testified about the 2004 e-mail incident. He indicated it was not a good practice to send e-mail to your home, especially when the e-mails have attachments. Tr. at 84. He searched plant records for the 2004 e-mail that the individual sent to his home, but was unable to find the e-mail or any information about it. Tr. at 67. He testified that there has been a general concern regarding employees inadvertently sending e-mails containing classified information. Tr. 67. Recently, the site has implemented a software packages that reviews e-mail sent off site to determine if it contains classified information. Tr. at 68.

The supervisor also testified about the 24 removal incidents. He said the question he would ask in reviewing the matter to determine if it was a security violation is "did he develop classified information and take it home, or did he take home a document that was marked classified." Tr. at 89. He indicated that he believed the individual took home unmarked work papers and that taking home such self generated work papers is not nearly as serious a breach of security as the removal of

documents marked as classified. Tr. at 89. He further testified that he does not believe that the individual is a security risk. Tr. at 91.

With regard to the draft report incident, the supervisor indicated that the portions of the report that the individual testified he removed from the site in 2003 are now considered unclassified, based upon a recent determination that the project completion date is not classified. Post hearing e-mail from the supervisor.

C. The Individual

The individual testified that since 1971, with the exception of a three year absence when he taught at a college (1998-2001), he has worked as an engineer for various contractors at two DOE sites. He has held a security clearance since 1971. Tr. at 14. Between 1971 and 1986 he was in the industrial engineering department at his current site. Since 1986, he has held a number of consulting and management positions at two DOE sites. Tr. at 16 and individual's exhibit #1.

1. The 1986 Slide Incident

The individual testified that the security infraction violation he received in the 1980's resulted from his failure to return the meeting slides to the site immediately after his plane arrived in the city in which the site is located. He testified that since he made that mistake, he immediately returns classified information after trips. Tr. at 60.

2. The Twenty Four Removal Incidents

The individual testified that during the period in which he worked in the industrial engineering department (1971-1986) he took work papers home on most days to complete his assigned duties. On approximately 24 occasions he unintentionally took documents to his home that contained classified information. He testified that the documents were not marked as classified and he did not realize the documents contained classified information when he placed them with the papers he was taking home for that evening. Tr. at 90. He discovered the classified information was in the work papers when using the work papers at home. Personnel Security Interview at 26.

He provided an example of the difficulty of determining whether a work paper was classified. Work papers often contained expenditures and total labor hours for a project. Such work papers were not classified. However, if those work papers also contained labor standards (production rates) the work papers would be classified. This is so because dividing total labor hours by labor standards for the project would provide a project's production. Tr. at 98. Production levels for many DOE projects are classified. Tr. at 28. Therefore, in order to permit expenditures and total labor hours to be released in budget documents the DOE generally protects the labor standards for each project. However, if labor standards are included, the document becomes classified. Tr. at 29.

Similarly, if total labor hours and labor rates were included on a work paper but the project was not identified, the work paper would not be classified. However, if the project name or number were

included or could be deduced, the work paper would be classified. Therefore, two or three documents could each be unclassified. However, if the documents are put together it may be possible to deduce the name of the project. The two or three documents together are then classified.

Tr. at 98. Therefore, it is possible to take home documents that are individually unclassified only to discover that the documents when taken together are classified.

When using the work papers at home, the individual would occasionally discover that the combination of information indicated that the documents should be considered classified, and that he should not have removed them from the site. He testified that he never intentionally removed a document that contained classified information but indicated that he was amazed at how he could get tripped up. Tr. at 28. On the next morning he always returned all classified information to the site. Tr. at 30.

3. Draft Report Incident

In this incident the individual took home five parts of a draft report. Tr. at 120. Those five parts were not marked as classified. Tr. at 120. He testified that when he read the five parts of the draft report at home, he found that they contained a project completion date which he believed was classified. Tr. at 121. He returned the five parts of the draft report to the site and marked them as confidential NSI information. Tr. at 121. He testified that he has recently learned that the date is no longer considered classified. Nevertheless, the individual testified that his removal of the portion of the report from the site with a date that he believed was classified is a failure to adequately protect classified information.

4. The E-Mail Incident

The individual testified that he sent an e-mail to his residence with information about an upcoming trip. He attached to his e-mail an e-mail he received from a co-worker with information about the meeting. He believed the co-worker's e-mail provided details about the meeting. Tr. at 47. However, one of the attachments to the co-worker's e-mail contained the minutes of a prior meeting. Individual's exhibit #3. Those minutes contained unclassified controlled nuclear information. Tr. at 46. He testified that he failed to review the attachment to the e-mail before he e-mailed the document. However, he now understands the security concerns relating to e-mail and that it is his responsibility to review all attachments to his e-mails. Tr. at 50. He testified that he no longer sends e-mail to his home. Tr. at 54.

The individual testified that he has made some mistakes, but that he has corrected them. Tr. at 60. The individual also testified that he has a respect for security rules, and that he has always been candid and open in discussing his mistakes. Tr. at 61.

III. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the hearing officer. As

discussed below, once a security concern has been raised, Part 710 clearly places upon the individual the responsibility to bring forth persuasive evidence concerning his eligibility for access authorization, and requires the hearing officer to base all findings relevant to his eligibility upon a convincing level of evidence. 10 C.F.R. §§ 710.21(b)(6), 710.27(b), (c), (d).

A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. Once a security concern has been raised, the standard in this proceeding places the burden of proof on the individual. It is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting her eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

This is not an easy evidentiary burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring an access authorization. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of access authorizations indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of an access authorization). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to her own testimony, the individual in these cases is generally expected to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the hearing officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE ¶ 82,752 (1995).

B. Basis for the Hearing Officer's Decision

In a personnel security case under Part 710, it is my role as the hearing officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. §710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

IV. ANALYSIS

The individual has been consistent in his descriptions of the four failures to protect classified information. The individual has presented three basic arguments to mitigate the security concern regarding his failure to properly protect classified information. First, his removals of classified information were inadvertent. Second, he voluntarily provided all of the information that is relied on by the DOE. Third, he accepts responsibility and has taken steps to assure that there will be no future violations.

In reviewing this matter, I find it is clear that the individual's failures to protect classified information were not intentional and that none of the failures resulted in the improper removal of documents that were actually marked as classified. Further, none of his four failures resulted in the release of classified information. Another important mitigating factor in this case is the individual's candor in providing information to the DOE. In this regard there is no document in the individual's security file which would indicate awareness by anyone of any security violations.³ Absent the individual's statements to the polygraph operator, the security specialist during the PSI and during the hearing, the DOE would be unaware of the individual's four failures to protect classified information. In the PSI and during the hearing, the individual provided detailed information about each of the events. His candor and willingness to admit that he needs to work harder to protect classified information suggest to me that the individual is likely in the future to follow DOE security regulations regarding the protection of classified information.

Furthermore, considered separately, the facts of the individual's four failures to protect classified information do not raise the risk that the individual will violate security rules in the future. The two recent failures were not severe or aggravated violations. The draft report removed in 2003 was a report that had been reviewed by others and found to be unclassified. This was a reasonable basis for the individual's decision to take the document home to review. The fact that he found a piece of information in the document that he believed to be classified does not suggest to me that he was not vigilant in following security rules. With respect to the January 2004 e-mail, sending an e-mail with an attachment that has Unclassified Controlled Nuclear Information is a security concern regarding information less sensitive than classified information. His supervisor testified that the site has had a number of problems relating to attachments to e-mail and has improved the ability of its computer systems to indicate the classification level of attachments. The individual has now received guidance on the proper review of e-mail attachments. He now understands the problems with e-mail and has indicated he now reviews all e-mail before sending. The other two failures were 20 years ago and I believe, with the passage of time, that they are not current security concerns.

Although I do not believe that any of the four failures to protect classified information individually indicates an ongoing security concern, taken together the individual's four failures to protect classified information could suggest a pattern that raises a security concern. However, I believe the individual has mitigated that concern by his open and candid disclosure of the four failures, accepting responsibility for them and by changing his behavior. The 24 removal incidents, the e-mail incident and the draft report incident resulted from the individual taking documents home to

³ The DOE counsel has indicated that there is no record of the 1986 slide security infraction in the individual's file.

complete his assigned duties. The individual has indicated that he has stopped sending e-mail to his home, and that since 1986 he does not take work papers home and only rarely takes reports home. I believe the 2003 draft report removal was an isolated incident that was based on his reasonable belief that the document was unclassified. I find that the draft report removal, while inappropriate, does not suggest a continuation of his 1971-1986 pattern of the removal of work papers. I am convinced that in the 20 years since the 24 removal incidents, the individual has been vigilant in protecting classified information and has not developed a pattern of security violations regarding classified information. I believe he will be careful and responsible in protecting classified information in the future.

V. CONCLUSION

I have concluded that the individual has mitigated the DOE security concern under Criterion G of 10 C.F.R. § 710.8. In view of the record before me, I am persuaded that restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I find that the individual's access authorization should be restored.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the revised procedures, a party may file an appeal. The review is performed by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

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Thomas L. Wieker
Hearing Officer
Office of Hearings and Appeals

Date: May 4, 2005